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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PABLO P.,

Respondent,

v.

MARIA T.,

Appellant.

D074661

(Super. Ct. No. 17FL009696C)

APPEAL from an order of the Superior Court of San Diego County, Margo L. Lewis Hoy, Judge. Affirmed.

Judith Klein for Appellant.

Law Offices of David C. Beavans and John T. Sylvester for Respondent.

Maria T. appeals from an initial child custody determination awarding Pablo P. primary physical custody of their minor child, Julian T. Maria contends that the trial court (1) did not properly consider the criteria for custody orders, (2) abused its discretion by dismissing the mediator's evaluation, and (3) should have ordered further mediation or

an evaluation. She also claims that substantial evidence does not support the court's factual findings.

After considering the testimony and the mediator's report, the trial court issued an oral ruling from the bench and prefaced its findings with the statement that "[T]his case has given me a lot of thought. Outside of [court], I've spent a lot of time thinking about this case because it's a difficult case." Thereafter, the trial court issued an 11-page statement of decision awarding Pablo physical custody of Julian after finding that Maria's "own acts and testimony in the matter [did] not support a finding that she would be willing or able to act in Julian's best interest or [e]nsure the frequent and continuous contact Julian is entitled to have with both of his parents."

Like the trial court, we consider this to be a difficult case because both parents appear to be loving and capable of caring for Julian. After reviewing the record and statement of decision in light of the parties' arguments on appeal, we conclude that the record does not support Maria's claim that the court's decision was "tainted by a punitive animus toward" her. Rather, the trial court's findings are supported by the evidence, and its orders are within the bounds of reason and are consistent with controlling law. We find no basis for disturbing the way the court exercised its discretion and therefore affirm the order.

FACTUAL BACKGROUND

Maria and Pablo lived in Boston, Massachusetts, and dated for three years. They decided to have a child together because they had a good relationship. Although Maria

did not want to have a child out of wedlock, she decided to do so because Pablo promised that they would marry after she became pregnant.

Maria became pregnant after six months of in vitro fertilization treatment. At the time, Maria lived in Boston with her family and worked as a program coordinator at a school. Maria intended to move to San Diego where Pablo currently lived. Maria claimed that Pablo changed his mind about marrying her 16 weeks into the pregnancy. Maria was "devastated" because she did not want a child out of wedlock.

Julian was born prematurely. The day after his birth he underwent a bowel resection due to a twist in his intestines. In 2011, when Julian was three months old, Maria moved to San Diego to live with Pablo "because [she] thought it was important that Julian be in a nuclear family." Pablo was in Boston for the birth and visited Boston three or four times after the birth and before Maria's move to San Diego.

From July 2011 to December 2015, the family lived in Pablo's condominium in San Diego. The couple shared child-rearing duties and made joint decisions. The family regularly visited Boston where Maria's parents lived and where she had close friends. The family also traveled to Argentina where Pablo's family resided.

The couple separated in December 2015. In 2016, Pablo moved out of his condominium so that Maria and Julian could remain there. Pablo paid the mortgage on the condominium and all expenses. Pablo also provided Maria with a car and paid all of her expenses. Maria admitted that Pablo provided her with financial security.

Pablo stated that he and Maria did not have an agreement as to when she needed to return to work, but in their discussions he told her that he wanted her to "help out and go

back to work after a period of time, and she decided not to." Maria admitted that she did not start looking for work in San Diego until January 2016. Maria also admitted that she refused to get a job after Julian was born, but denied that Pablo frequently asked her to get a job. She agreed, however, that her refusal to get a job was one of the main reasons the relationship failed.

In July 2017¹ with Pablo's consent, Maria took Julian to Boston on vacation with the understanding that they would return to San Diego the first week of August. Maria, however, refused to return to San Diego and started looking for employment in Boston.

On August 28, Pablo filed a petition to establish his parental relationship with Julian. Pablo alleged that Maria moved to Boston in bad faith. Pablo sought custody of Julian or, alternatively, for a visitation schedule. Although he would have been happy if Maria returned to San Diego he did not ask her to move.

The trial court denied Pablo's ex parte application requesting that Julian move back to San Diego, ordered the parties to attend mandatory family court services (FCS) mediation in September, and set a custody hearing for October. In September, the parties attended FCS mediation. The parties did not reach an agreement and the mediator issued a report and recommendation for the trial court's consideration. In October, the trial court issued a temporary custody order that Julian remain in Boston pending an evidentiary hearing and set a visitation schedule. From October to April 2018, Pablo traveled to Boston for weeklong periods each month to visit Julian.

¹ Undesignated date references are to 2017.

At the evidentiary hearing in April 2018, the court heard testimony from the mediator and the parties. The trial court issued an oral ruling from the bench. After considering objections to a proposed statement of decision, the court issued a written statement of decision awarding physical custody to Pablo in San Diego. The court found, among other things, that Maria "took Julian away from [Pablo] in a deceitful manner and proceeded to make decisions on Julian's behalf without input or consideration [from Pablo]." Maria timely appealed.

DISCUSSION

I. GENERAL LEGAL PRINCIPLES

In an initial custody determination, a trial court, considering all the circumstances, has the widest discretion to choose a parenting plan that is in the child's best interests. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31-32 (*Burgess*); Fam. Code, § 3040.)² "When there are competing parental claims to custody, the family court must conduct an adversarial proceeding and ultimately make an award that is in 'the best interest of the child.' " (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1053, citing § 3040, subd. (b).) There are no bright line rules in child custody cases and every case must be evaluated on its own unique facts. (*Burgess*, at p. 39.) In making its decision, the court must consider all relevant factors, "including the child's health, safety, and welfare, any history of abuse by one parent against any child or the other parent, and the nature and amount of the child's contact with the parents." (*In re Marriage of Brown & Yana* (2006)

² Undesignated statutory references are to the Family Code.

37 Cal.4th 947, 956 (*Brown*); see § 3011 [setting forth best interest factors].) The court must also consider "which parent is more likely to allow the frequent and continuing contact with the noncustodial parent." (§ 3040, subd. (a)(1).)

"A custody decision allowing one parent to move [a child] out of the state necessarily interferes with the other parent's ability to have frequent and continuing contact with [the child]" and " 'is one of the most serious decisions a family law court is required to make.' " (*In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, 1119.) "A trial court may consider the extent to which the minor children's contact with their noncustodial parent will be impaired by relocating. In so doing, however, it is not restricted to any particular formula for contact or visitation; nor is it required to make a custody determination that preserves the . . . status quo." (*Burgess, supra*, 13 Cal.4th at p. 36, fn. omitted.) Additionally, the statutory scheme "no longer requires or permits the trial courts to favor the mother in determining the proper custody of a child 'of tender years.' " (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 730.) "Regardless of the age of the minor, therefore, fathers now have equal custody rights with mothers; the sole concern, as it should be, is 'the best interests of the child.' " (*Ibid.*)

We review custody orders for an abuse of discretion. (*Burgess, supra*, 13 Cal.4th at p. 32.) We must uphold the trial court's "ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*Ibid.*) "The test is not whether this court would have made the same order or whether the trial court could have reasonably made some other order, but 'whether the trial court could reasonably have concluded that the order in question advanced the "best interest" of the child.' " (*Lester v. Lennane* (2000)

84 Cal.App.4th 536, 595.) A trial court abuses its discretion if there is no reasonable basis on which the court could conclude its decision advanced the child's best interests. (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15 (*F.T.*)). An abuse of discretion may also be found when the trial court applied improper criteria or made incorrect legal assumptions. (*Ibid.*) "When applying the deferential abuse of discretion standard, 'the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' " (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.)

" '[W]e are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]. All issues of credibility are likewise within the province of the trier of fact. . . . All conflicts, therefore, must be resolved in favor of the respondent.' [Citation.] Moreover, in examining the sufficiency of the evidence to support a challenged finding, we ' ". . . must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion." [Citations.] If appellate scrutiny reveals that substantial evidence supports the trial court's findings and conclusions, the judgment must be affirmed.' " (*Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 931.) The testimony of a single witness, even that of a party, may be sufficient to constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

II. *THE TRIAL COURT'S FINDINGS*

The court found that Pablo had done everything possible to preserve his relationship with Julian and mitigate the potential damage that Maria's actions created, listing Maria's actions that impeded Pablo's ability to regularly visit Julian pending the evidentiary hearing. It found Pablo to be the more collaborative parent and, based on his testimony and his actions toward Maria and Julian, found credible his desire to coparent Julian with Maria. The court found that Maria's move from San Diego, where Pablo supported her with a home, vehicle, and paid expenses, to Boston, where her family supported her, was to satisfy her own needs and that she failed to consider the best interests of Julian or Pablo. Based on its findings, the court determined that:

"[W]hen looking to the best interest of the child under Family Code Section 3011, that [Pablo] has been an involved, active parent and is strongly bonded to Julian. The period of absence created by [Maria's] own actions and deceit were mitigated by [Pablo] to the best of his ability. The evidence shows that [Pablo] has acted in the best interest of Julian since his birth and has demonstrated a desire to co-parent with [Maria]. [Maria] had no regard for how her actions would affect Julian or [Pablo]. [Maria] simply removed Julian from his home, his belongings and [Pablo] with no intentions of returning. To date, Julian's personal things remained boxed in San Diego and [Maria] made no attempt to obtain his things. [Maria] took Julian away from [Pablo] in a deceitful manner and proceeded to make decisions on Julian's behalf without input or consideration of [Pablo].

"Independent from one another, the court finds that [Maria] and [Pablo] are both capable, loving and appropriate parents. Julian is bonded to both parents and has strong attachments to both [Maria] and [Pablo]. However, the court strongly weighs the fact that the evidence presented in this matter provides that [Pablo] is the parent who understands the importance of Julian's ongoing, continuous relationship with both of his parents. [Pablo] is the parent who the court finds will encourage and facilitate the relationship between Julian [and Maria] pursuant to Family Code Section 3020[, subdivision](b). [Maria's] own acts and testimony in the matter do not support a finding that she would be willing or able to act in Julian's best

interest or insure the frequent and continuous contact Julian is entitled to have with both of his parents."

III. *THE COURT CONSIDERED THE PROPER CRITERIA*

Maria claims that in awarding physical custody to Pablo, the court "blatantly disregarded the consequences of separating seven-year[-]old Julian from the parent who had been his primary caretaker" and gave undue weight to the Pablo's interests by effectively deciding that he was the more deserving parent.

A trial court must make a custody determination according to the best interests of the child based on the factors listed in section 3011 and considering which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent. (§ 3040, subd. (a)(1).) Both parties argued Julian's best interests during their respective closing arguments. The statement of decision shows that the court based its orders on Julian's best interests under section 3011.

Maria is correct that a paramount concern in any custody decision is the need for stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bonds. (*Burchard v. Garay* (1986) 42 Cal.3d 531, 541.) However, a child's interest in stability is entitled to the most weight only "[o]nce the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child." (*Brown, supra*, 37 Cal.4th at p. 956.) Here, there were no custody or visitation orders and the court had the discretion to weigh all the relevant factors. Maria's argument that the court mis-weighed

the relevant factors amounts to a challenge to the sufficiency of the evidence. As we discuss below, the evidence supports the court's challenged findings. (*Post*, pt. IV.)

Because there were no custody or visitation orders in effect, Maria had the right to move with Julian. Maria's right to move, however, is not the only issue. The more probative issue in these proceedings is the manner Maria exercised this right by misrepresenting to Pablo her intention to permanently take Julian out of state. Here, the court had before it two parents who were both able and willing to care for Julian. The court considered that Maria had always been Julian's primary caregiver, but "strongly weigh[ed]" the evidence showing that Pablo was the parent who would encourage and facilitate Julian's relationship with Maria under section 3020, subdivision (b). Maria has not met her burden of showing that in making this factual determination, the court abused its discretion.

Maria next contends that the court abused its discretion by dismissing the mediator's evaluation as stale because the factual findings upon which the mediator had based his recommendation, such as Julian's age, his bond with Maria, previous custody arrangements, and Pablo's less significant involvement in Julian's day-to-day care, remained unchanged.

Mediation took place in September 2017, after Julian had been living in Boston for two months. The mediator concluded that Maria should have primary physical custody. Although the mediator's report is not included in the clerk's transcript, the mediator testified at the hearing that he did not have enough information to find that Maria moved to Boston with Julian in "bad faith." Nonetheless, as a general matter, the mediator did

not consider it a good idea for a parent to move a child without any collaborative discussion with the other parent.

In its statement of decision, the trial court found that the characterization of Maria's decision to remain in Boston with Julian was a legal issue for the court to decide. It noted that the mediator did not address Maria's unilateral decision to remain in Boston with Julian. Although not included in its statement of decision, the court stated from the bench that it did not find the mediator's testimony "all that helpful in the sense that it was back in September [2017]" and the mediator did not consider the way Maria moved. The court noted that the mediator made no collateral contacts and it characterized the mediator's report as "somewhat stale."

As a preliminary matter, the record does not support Maria's claim that the trial court disregarded the mediator's report as stale. Although the mediator's report was marked as an exhibit, the record does not reflect whether either party asked the court to receive the report into evidence. Nonetheless, the court's oral statements from the bench suggest that the court read the mediator's report. Additionally, the mediator's report lost much of its significance because the mediator testified at the hearing.

The court's oral statement after the hearing noted that the mediation was not "very extensive" and that the mediator made no collateral contacts. The court also expressed concern that the mediator failed to consider "the way in which this child was taken to Boston" and incorrectly concluded that Pablo "really didn't have an issue with the fact that the child was removed to Boston." Thus, the question here is not whether the trial court considered the mediator's report and testimony, but whether the court abused its

discretion in according little weight to that evidence. (*In re Marriage of Rosson* (1986) 178 Cal.App.3d 1094, 1104 [mediator's report in a custody case is "evidence to be weighed with all other evidence. . . ."], disapproved on another point in *Burgess, supra*, 13 Cal.4th at p. 38.) Moreover, the record reveals that Maria is misconstruing the court's use of the word "stale" as suggesting that the court failed to consider the mediator's report. Rather, the court's oral statement after the hearing shows the comment referred to when the mediation took place (September 2017), not to the continued validity of the mediator's findings regarding Julian and Julian's connection to his parents. The evidentiary hearing took place approximately seven months *after* the mediation; thus, the trial court had additional evidence to consider. "[I]t is the court, not the mediator, that bears the responsibility to decide custody." (*Rosson*, at p. 1104.) We are not at liberty to reweigh the evidence supporting the trial court's conclusions.

Finally, Maria argues that, to the extent the trial court believed that the mediator's analysis was stale or not helpful, it abused its discretion by failing to order either a new mediation session or an expert to evaluate the case. We disagree.

"Mediation is provided early in the proceeding to help the parents to reach their own resolution of such disputes. When mediation is unsuccessful in resolving the custody or visitation dispute, the statutory requirement has been met and a resubmittal to mediation need not be ordered at the request of a party upon trial of that dispute." (*In re Marriage of Green* (1989) 213 Cal.App.3d 14, 25.) Accordingly, the court was not required to order another mediation. Moreover, Maria was aware of the scope of the mediation and could have requested that the mediator make collateral contacts, including

interviewing Julian. Maria forfeited any issue regarding the scope of the mediation by failing to raise this issue to the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 ["[R]eviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court."].) As the trial court noted in its statement of decision, "[n]either party requested or sought a subsequent [FCS] Mediation or psychological evaluation nor did the court order either pending the evidentiary hearing."

IV. *SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS*

Maria contends that the trial court's characterization of her decision to remain in Boston as selfish and deceitful is not supported by the evidence. She claims that multiple factors motivated her decision and reviews the evidence showing that she did not act deceitfully. Pablo complains that Maria set forth only her version of the evidence and ignores large portions of the record containing substantial evidence that supports the trial court's finding that her move to Boston was deceitful.

" 'A party who challenges the sufficiency of the evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient.' " (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738, italics omitted.) Additionally, " '[i]n viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be

reasonable.' [Citation.] 'If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence.' " (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 47.)

After considering all the evidence, the trial court found that Maria acted deceitfully. To be sure, the evidence presented at trial could have supported different inferences regarding Maria's actions than the one reached by the trial court. But that is not a sufficient basis for us to disturb the judgment. (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822 ["Our sole inquiry is 'whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted,' supporting the court's finding."].)

Here, even accepting as true Maria's testimony that she took Julian to Boston on vacation with the intent to return to San Diego, at some point in time Maria decided that she would permanently stay in Boston with Julian. Once Maria made this decision, she should have informed Pablo. The evidence supports the inference that she deceitfully failed to do so. For example, after being in Boston for several weeks Maria informed Pablo that she and Julian would return to San Diego in early August. She later changed her return date to August 22, which prompted Pablo to visit Julian in Boston. Maria candidly admitted that during this visit she never even broached the subject that she might want to stay in Boston. Maria testified that she obtained her first job interview in Boston after Pablo visited. This testimony supports a reasonable inference that Maria had already decided to stay in Boston, and thus started applying for jobs there, before Pablo's visit. Maria waited until a few days before her August 22 return date to inform Pablo that

she planned to stay in Boston. This evidence amply supports the inference that Maria acted deceitfully.

The trial court found Pablo to be the more collaborative parent and, based on Pablo's testimony and actions toward Maria and Julian, found credible his desire to coparent Julian with Maria. Maria contends that the evidence did not support the court's finding that Pablo was the more collaborative parent. We disagree.

A trial court must make a custody determination after, among other things, considering which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent. (§ 3040, subd. (a)(1).) Here, Maria's admission that she unilaterally decided to stay in Boston with Julian, standing alone, supports the trial court's conclusion that Pablo is the more collaborative parent. However, other evidence also supports this conclusion. Maria admitted enrolling Julian in a Catholic school knowing that Pablo did not practice the Catholic religion and without discussing this with Pablo. Maria made an appointment with a new nutritionist and did not inform Pablo until the day before the appointment. Maria also objected to Julian flying unaccompanied to and from his April 2018 visit with Pablo, even though she admitted not reading any of the airlines' unaccompanied minor programs and claiming that she wanted Julian to become more independent.

Maria next claims that the court's decision to grant physical custody to Pablo was actually based on the court's biased attitude toward her. Maria, however, does not support this serious accusation with evidence in the record that could reasonably be interpreted as showing judicial bias. "When making a ruling, a judge interprets the

evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias." (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219.) After reviewing the record, we are satisfied that a reasonable person would not entertain doubts concerning the judge's impartiality.

Finally, Maria contends that the trial court abused its discretion by giving more weight to what it termed a poor decision by Maria than to Julian's best interests. This argument, however, challenges the sufficiency of the evidence supporting the trial court's ultimate decision that Julian's best interests would be served by changing his primary physical custody to Pablo. We, however, rejected Maria's challenges to the sufficiency of the evidence and she has not shown that the trial court applied improper criteria. (*F.T., supra*, 194 Cal.App.4th at p. 15.) In summary, we conclude that the trial court did not abuse its discretion in awarding Pablo physical custody.

DISPOSITION

The order is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

DATO, J.